FILED
FEB 1 1985
ALEXANDER L. STEVAS, CLERK

No. 84-951

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

GULF COAST CABLE TELEVISION CO.,
Petitioner,

v.

AFFILIATED CAPITAL CORP.,
Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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1.

Affiliated nowhere denies that the issues raised by this case—the scope and viability of the "co-conspirator exception" to *Noerr-Pennington* immunity—are important and worthy of this Court's review. It merely maintains that "[s]omeday" (Response to Petition for Writ of Certiorari, hereinafter "Response," at 18), long after its $6.3 million judgment is secure, there will come a more appropriate time for this Court to examine these issues.

Affiliated's response candidly admits that the decision below newly empowers federal antitrust courts to regulate state and local political activity deemed undesirable. While recognizing the novelty of the Fifth Circuit's approach, respondent defends the result but ignores the circular logic from which it sprang.

Affiliated does not dispute that Gulf Coast and other franchise applicants "could [legally] conspire[ ] among themselves to petition the City for legislative action favorable to them even if their purpose had been to eliminate or limit competition from others . . . ." (A. 119) Nor is it disputed that a public official's "participation" in that conspiracy "through [his] influence in favor of [the petitioning parties]" does not vitiate *Noerr-Pennington* immunity. (*Id.*)

The courts below held that the *Noerr-Pennington* shield is removed when an official's involvement goes beyond "participation" to a level the Fifth Circuit called "active[ ] conspir[acy]" (A. 120) and "orchestration." (A. 117) But none of the opinions below articulated a standard for judging when legal "participation" becomes "illegal" conspiracy. The "sophisticated rule" Affiliated finds in the district court opinion merely repeats this tautology—"valid governmental action" does not violate *Noerr-Pennington*; "illegal" action destroys the immunity. (Response at 4-5) Affiliated does not even try to give content to the term "illegal," except by repeated reference to bribery as an example. Bribery, of course, was not present nor alleged here.

Affiliated suggests that the novel "rule" of this case should "have an opportunity to be applied by other courts." (Response at 9) The reverse is true: certiorari should be granted precisely in order to forestall application of the Fifth Circuit's subjective jurisprudence by other courts.

The Response attempts to transform the lower courts' vice of articulating no meaningful standard into a virtue, by celebrating the discretionary nature of the Fifth Circuit's new test. *See, e.g.*, Response at 18. Affiliated assures the Court that "[a]fter all," this flexible co-conspirator exception will only be applied when the courts think it appropriate. *Id.* at 9. The Fifth Circuit, of course, applied the exception in this case *because* of its unhappiness with Houston's political franchising process. (*See, e.g.*, A. 5) The Mayor's testimony concerning Gulf Coast's political muscle was not "snippet[ed]" out of the

record for purposes of this petition, as respondent suggests (Response at 12)--it was highlighted and relied upon by all the courts below. The evidence that Affiliated's defeat in the City Council was attributable to politics is what the Fifth Circuit focused upon and found intolerable.

Despite the Fifth Circuit's reliance upon that evidence, and in the face of Judge Higginbotham's explanation that courts must now decide whether local political activity is "justif[ied]" (A. 34), Affiliated maintains that the opinions below "may smack of judicial activism" only to the "casual reader." (*Id.*) Any reader, casual or careful, will perceive that the Fifth Circuit would have federal antitrust courts passing upon the purity of local political processes—an exercise that threatens both federalism and the administration of the antitrust laws. That brand of judicial activism calls for this Court's review and reversal.

2.

The co-conspirator exception has been rejected, in a virtually identical context, by the Seventh Circuit; it has been criticized by other circuits and by commentators; and it has never been previously applied to impose antitrust liability. The Response is barely able to muster a challenge to these facts.

Affiliated is no more able than the courts below to articulate a principled distinction between this case and *Metro Cable Co.* v. *CATV of Rockford, Inc.*, 516 F.2d 220 (7th Cir. 1975). Much as the district court merely stated that the facts here "exceed" those in *Metro Cable*, the Response merely accuses Gulf Coast of "misreading" that decision. These assertions do not obscure the Seventh Circuit's holding that it would "abrogate the *Noerr* doctrine" to apply the co-conspirator exception on the facts of that case. Those facts included an agreement between the Mayor and an alderman "to use their best efforts to prevent plaintiff from getting a franchise . . . . '[In] exchange' each official was given 'a substantial sum' as a

campaign contribution." Because the Mayor acted "pursuant to [that] agreement" and brought "pressure . . . on the [City Council]," the Council disregarded the recommendation of its own License Committee and awarded the franchise to defendant rather than to plaintiff. 516 F.2d at 223. The parallels are striking.

No other court has been confronted with facts so similar to those here, but two other Circuits have explicitly questioned whether a co-conspirator exception should exist at all. *See* Petition at 10-11. Affiliated has no meaningful response to those cases, and its response to the commentators' uniform criticism of the co-conspirator exception is virtually to ignore it—with the exception of a rather surprising attack upon what may be the leading law review article in the field.[1] Affiliated dismisses Professor Fischel's 1977 condemnation ("the co-conspirator exception is unworkable and should not be recognized"[2]) as a mere "prediction" not supported by later cases, but in fact his words were quoted approvingly in 1983 by the Eighth Circuit and in 1981 by the District of Columbia Circuit. *See* Petition at 10-11.

3.

Respondent concedes both the uncertainty surrounding the co-conspirator exception and the novelty of the Fifth Circuit's approach (*see*, *e.g.*, Response at 9). But it contends that the law should not be "settled" by this Court in this case because Gulf Coast's conduct may have also constituted "sham" peti-

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1 D. Fischel, *Antitrust Liability for Attempts to Influence Government Action: The Basis and Limits of the Noerr-Pennington Doctrine*, 45 U. Chi. L. Rev. 80 (1977). Professor Fischel's article has been cited approvingly by this Court and in over a dozen Court of Appeals opinions.

2 The only possible exception recognized by Fischel might be where the official is acting solely to further his own direct economic interest, *e.g.*, bribery.

tioning unprotected by *Noerr-Pennington*. This contention is a red herring.

First, it is undisputed that Gulf Coast was making a *genuine* effort to influence government action; indeed, Affiliated's complaint here is that Gulf Coast was successful. Such conduct cannot be a "sham." *Clipper Exxpress* v. *Rocky Mountain Motor Tariff Bureau, Inc.*, 690 F.2d 1240, 1253 (9th Cir. 1982), *cert. denied*, 103 S. Ct. 1234 (1983).

Second, there was no holding below that Gulf Coast had engaged in "access-barring" (the *en banc* majority said it was not necessary to reach that issue), nor were there grounds for such a holding. Affiliated was never barred from access to the Houston City Council. *See Metro Cable Co.* v. *CATV of Rockford, Inc.*, 516 F.2d 220, 232 (7th Cir. 1975); *Franchise Realty Interstate Corp.* v. *San Francisco Local Joint Executive Board*, 542 F.2d 1076, 1079 (9th Cir. 1976), *cert. denied*, 430 U.S. 940 (1977) (defendants' efforts to exert political influence "have [not] in any way impaired [plaintiff's] ability fully to present its views . . . .").

Finally, even if there were a "sham" issue in this case, certiorari would be warranted to settle the law on the co-conspirator issue squarely presented by this record. After ruling on that point, this Court could of course remand to the Fifth Circuit to consider any subsidiary issues.

4.

Affiliated correctly acknowledges that the Local Government Antitrust Act of 1984[3] does not apply to the facts of this

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3 Pub. L. No. 98-544, 98 Stat. 2750 (1984). The language quoted at page 16 n.38 of the Response, purportedly § 2(a) of this Act, in fact appears nowhere in the statute as finally enacted. And Affiliated's attempt to rely upon a passing reference to this case in the statute's legislative history is unavailing. Congress nowhere endorsed the Fifth Circuit's application of the co-conspirator exception; indeed, it did not address the concept of a co-conspirator exception at all.

case. Notwithstanding that fact, respondent contends that enactment of the statute somehow lessens the likelihood that the co-conspirator exception will be applied in the future as the Fifth Circuit used it here. The new law (which restricts damages but not injunctive relief) does nothing to restrict the reach of any co-conspirator exception, and in fact does not affect the *Noerr-Pennington* doctrine at all. Under the Fifth Circuit's precedent, courts remain free to deny *Noerr-Pennington* immunity to private parties who petition the government, whenever a federal judge decides that political give-and-take includes "excessive" participation by a public official being lobbied.

The new statute actually highlights the danger. Because the statute equates municipal action with state action for purposes of private liability, it means that the Fifth Circuit's decision applies equally to state governments, and cannot be limited to cases involving municipalities. *See* Conf. Rep. No. 1158, 98th Cong., 2d Sess. 3.

5.

Finally, Affiliated suggests that certiorari is inappropriate here because of the pendency of *Southern Motor Carriers Rate Conference, Inc.* v. *United States*, No. 82-1922 (U.S. argued Nov. 26, 1984). But Affiliated does not identify any opportunity available in that case to clarify the co-conspirator exception: in fact, no such opportunity even remotely presents itself.

* * *

For the reasons stated above and in the Petition for Certiorari, the petition should be granted.

February 1, 1985

Respectfully submitted,

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